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COURT OF CRIMINAL APPEALS
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NO. PD-1137-16

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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ON APPEAL FROM THE COURT OF APPEALS FOR
THE NINTH DISTRICT OF TEXAS AT BEAUMONT

NO. 09-14-00361-CR

DAN DALE BURCH, *Appellant-Respondent*

v.

THE STATE OF TEXAS, *Appellee-Petitioner*

Arising from: **Cause No. 13-05-05739-CR**

IN THE 221ST DISTRICT COURT,
MONTGOMERY COUNTY, TEXAS

STATE'S APPELLATE BRIEF

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Oral Argument Not Requested

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Pursuant to Tex. R. App. P. 68.4, the State hereby lists all parties to this appeal with the names of all trial and appellate counsel:

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

The appellant was charged with the offense of sexual assault[1] (C.R. 22). He pleaded not guilty (3 R.R. 5), but the jury found him guilty as charged (6 R.R. 144). After hearing additional evidence, the trial court assessed the appellant's punishment at imprisonment for seven years (7 R.R. 20). The appellant filed a motion for new trial, which the trial court denied (C.R. 170, 205).

The appellant appealed his conviction and sentence. On August 24, 2016, the Ninth Court of Appeals issued a unanimous opinion that affirmed the trial court's judgment as to the issue of guilt but reversed the trial court's judgment as to punishment and remanded proceedings to the trial court to conduct a new sentencing hearing. *See Burch v. State*, No. 09-14-00361-CR, 2016 WL 4483087, at *2 (Tex. App.—Beaumont Aug. 24, 2016, pet. granted) (mem. op., not designated for publication). Neither the State nor the appellant filed a motion for rehearing, but both parties filed petitions for discretionary review in this Court.

On January 25, 2017, this Court granted the State's petition for discretionary review and denied the appellant's petition for discretionary review.

[1] *See* Tex. Penal Code Ann. § 22.011(a)(1)(A) (West 2011).

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the State does not request an opportunity to present oral argument because the issues herein may be resolved by application of this Court's existing precedents.

ISSUES PRESENTED

1. The Ninth Court of Appeals misapplied the standard set forth in *Riley v. State*, 378 S.W.3d 453 (Tex. Crim. App. 2012), when it ignored the trial court's ability to disbelieve the affidavits provided in support of the appellant's motion for new trial and concluded that the appellant established he would have elected for the jury to assess his punishment if he had received correct advice regarding his ineligibility for community supervision from the trial court.

2. The Ninth Court of Appeals misapplied the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for evaluating ineffective assistance of counsel claims when the court burdened the State to disprove prejudice and relied on speculation to conclude that the outcome of the trial would have been different if the appellant had received correct advice.

STATEMENT OF FACTS

I. The evidence at trial.

"Jamie"[2] was only seventeen years old when the appellant provided her with copious amounts of alcohol, waited for her to pass out, and sexually assaulted her.

A few hours before the assault, Jamie had been working as a waitress at Papa Ro's, the only bar in small-town Cleveland (5 R.R. 85). A few members of Jamie's

[2] The Ninth Court of Appeals assigned a pseudonym, "Jamie," to the victim in this case to conceal her actual name. *See Burch*, 2016 WL 4483087, at *1 n.1 (citing Tex. Const. art. I, § 30).

close clique of friends—Kayla Mills, Jordan Galloway, and Justin Parris—were hanging out and drinking at Papa Ro's before they decided to extend the party at Mills's parents' house, as they often did (5 R.R. 88–90; 6 R.R. 15). The appellant, with whom the others were acquainted but did not socialize on a regular basis, happened to be at Papa Ro's and accompanied the group to Mills's house (6 R.R. 39–41).

The appellant, at thirty-one years old, was the only one old enough to legally purchase alcohol; the group left the bar around midnight and bought a case of beer and a bottle of Seagram's 7 whiskey with the appellant's money (5 R.R. 97–98; 6 R.R. 17–18). Because the appellant was too intoxicated to drive, they left his truck at Papa Ro's with the understanding that Jamie would drive it to Mills's house when she got off work around 2:00 a.m (5 R.R. 98; 6 R.R. 19).

Jamie left work as planned and went straight to Mills's house to start drinking (5 R.R. 94, 97). Jamie, Mills, and Parris played multiple games of beer pong in an effort to get intoxicated.[3] Jamie estimated that she drank between eleven and twelve beers, as well as several whiskey shots (4 R.R. 51; 5 R.R. 102–03). Although Jamie frequently drank alcohol, she was small in stature at around five feet, three inches tall, and weighing approximately one hundred ten pounds (3

[3] Two other clique members—Liz Zacharias and Justin Coats—were also at Mills's house playing beer pong, but they did not stay long and had left by the time Galloway went to sleep (5 R.R. 93; 6 R.R. 14, 45).

R.R. 65–66). Needless to say, Jamie felt "very wasted" and wandered off to go to sleep sometime in the early morning hours (5 R.R. 102, 107). The last thing Jamie remembered was kicking off her sneakers—but otherwise remaining fully clothed—and "passing out" on Mills's bed (5 R.R. 107). The others stayed up drinking for a while longer, and eventually went to sleep. Galloway and Mills slept in Mills's mother's bed, while Parris slept on the couch (5 R.R. 164–65). This series of events was relatively common, as the group of friends often partied into the early hours of the morning at Mills's house, and each of them would stay over because they were too intoxicated to drive home (6 R.R. 10, 22–23).

The appellant's presence and behavior, however, was uncommon. Jamie's clique knew of the appellant because he "talked"[4] to their friend, Michelle Stetson, but the appellant had never partied at Mills's house before, and Stetson never came over that night (5 R.R. 90, 100–01; 6 R.R. 46). As the teenagers partied, the appellant stood to the side, did not play games, and stayed relatively quiet (6 R.R. 24). Jamie had never had a romantic encounter with the appellant, and she undoubtedly did not flirt with, kiss, or discuss having sexual relations with him that

[4] Based on the context of Jamie's testimony, "talking" appears to be teenage vernacular for the early stages of informal courtship (5 R.R. 91–92, 99–101).

night (5 R.R. 142–43, 145). In fact, Jamie had a long-term boyfriend at the time, with whom she was "obsessed" and "in love" (5 R.R. 86–87).[5]

Despite the lack of interaction between them, Jamie woke up to the appellant attempting to pull Jamie's pants back on over her hips (5 R.R. 109). Jamie's pants were stuck down around her knees, she felt that her shirt was "all messed up," and her brasserie was unclasped (5 R.R. 109). Jamie felt dirty, violated, and sore in her vaginal area; she could not explain why she did not wake up sooner, but she knew that she never consented to having sex with the appellant (5 R.R. 109–11, 123; 6 R.R. 29). In shock, Jamie panicked and told the appellant that she needed to go to the bathroom, but she went straight to wake up Galloway—her best friend—and told her what she was afraid had happened (5 R.R. 116–17).

Galloway, worried and scared, grabbed a pair of scissors and woke up Parris for help, because Parris was the only male other than the appellant in the house and Parris had friends in law enforcement (5 R.R. 217; 6 R.R. 30). Galloway soon called Jamie's mother for help, and then called the Montgomery County Sheriff's Department (5 R.R. 123; 6 R.R. 33). Both arrived just before 9 a.m. (4 R.R. 210).

Corporal[6] David Miller assisted with the investigation (4 R.R. 205–06, 210). Jamie, Galloway, Mills, and Parris each gave corroborating versions of the events

[5] To illustrate the small-town nature of Cleveland, everyone involved in this incident seemed to have a connection. Jamie's boyfriend was Galloway's cousin, and he also worked alongside the appellant at a company owned by Jamie's step-father (5 R.R. 97, 99; 6 R.R. 12–13).

from the night before, but the appellant claimed that he did not remember anything and declined to give a written statement (4 R.R. 222–24, 237). Because officers could not determine whether Jamie had been penetrated, they arrested the appellant only for furnishing alcohol to minors (4 R.R. 231–32).

A Sexual Assault Nurse Examiner (SANE) examined Jamie around 6 p.m. that night (4 R.R. 24). Jamie echoed the account she told her friends, her mother, and law enforcement, regarding the events from early that morning (4 R.R. 31). Although the SANE nurse found no physical trauma, she obtained DNA samples from Jamie's vagina for testing (4 R.R. 46–47).

By the time the tests came back to show a positive result for the presence of semen in Jamie's vagina, the appellant was nowhere to be found, and the case went cold (4 R.R. 79, 83, 88). Law enforcement officers were unable to obtain a DNA sample from the appellant until April of 2013, over five years after the assault, when he appeared in court for a hearing on his prior arrest (4 R.R. 137–38). Subsequent testing showed that the appellant's DNA, within a reasonable degree of scientific certainty, matched the male component of the mixture of DNA found in the vaginal sample obtained from Jamie during her SANE exam (4 R.R. 163–64).

During the guilt-innocence phase of the appellant's trial, the State elicited additional evidence from the appellant's ex-wife, Tracie Syracuse, who testified

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[6] Miller has since been promoted to Sergeant (4 R.R. 205–06).

about two prior incidents in which she reported that the appellant tore off her clothes and sexually assaulted her without consent (5 R.R. 198–202; 8 R.R. 54–58).

During the punishment phase, the appellant elicited testimony from two of his sisters that he was employed, that he supported a child from a previous marriage, that his sisters believed the appellant could successfully complete probation, and that the appellant had not violated his pretrial bond conditions (7 R.R. 8–9, 13–14). After expressly weighing the option of suspending the appellant's sentence and placing him on community supervision, the trial court nevertheless sentenced the appellant to imprisonment for seven years (7 R.R. 19–20).

II. The outcome on appeal.

The appellant's first two issues on appeal challenged the trial court's admission of testimony and statements regarding uncharged sexual assaults that the appellant's ex-wife reported to police during their marriage. In his third and fourth issues, the appellant sought a new sentencing hearing, arguing that his trial counsel rendered ineffective assistance by advising him to waive his right to allow a jury to decide his punishment. The appellant's fifth issue challenged the trial court's denial of his motion for new trial.

The Ninth Court of Appeals overruled the appellant's first two issues, concluding that the appellant was not entitled to a retrial on the issue of guilt. *See Burch*, 2016 WL 4483087, at *3–4. However, the court of appeals sustained the appellant's request in his third issue for a new sentencing hearing, concluding that his trial counsel led him to waive his right to have a jury decide his punishment when trial counsel should have advised him that only a jury could recommend he be placed on community supervision. *See id.* at *6. Thus, according to the court of appeals, the trial court abused its discretion as to awarding a new punishment hearing by denying the appellant's request for a motion for new trial. *See id.* Because the court of appeals sustained the appellant's third issue, the court of appeals did not address the appellant's remaining two issues, which likewise sought a new punishment hearing. *Id.*

SUMMARY OF THE STATE'S ARGUMENTS

Issue One: Under *Riley*, a reviewing court must view the evidence in the light most favorable to the trial court's ruling and defer to the trial court's credibility determinations. By denying the appellant's motion for new trial, the trial court implicitly disbelieved the affidavits provided in support of the appellant's motion. Thus, the Ninth Court of Appeals erred when it rejected the trial court's credibility findings and believed the appellant's contention that he would have insisted on electing for the jury to decide his punishment had his trial

counsel given him correct advice regarding his eligibility for community supervision from the trial court.

Issue Two: By implicitly finding the appellant's affidavit not to be credible, the trial court negated the only portion of the record that affirmatively demonstrated the meritorious nature of the appellant's claim that there was a reasonable probability that the outcome of the trial would have been different but for counsel's incorrect advice. The appellant's decision to allow the trial court to assess his punishment was entirely reasonable regardless of the incorrect advice he received from counsel in light of the nature of the appellant's crime and his trial counsel's past experience with Montgomery County juries assessing punishment in felony cases. Because the trial judge expressly contemplated probation as a potential punishment, the court of appeals misapplied *Strickland*'s prejudice prong and erroneously speculated that the appellant's mere eligibility for community supervision would have affected the outcome of the case.

ARGUMENTS AND AUTHORITIES

I. The court of appeals erroneously concluded that the appellant established he would not have elected for the jury to assess his punishment but for the incorrect advice of counsel.

The opinion of the Ninth Court of Appeals relied on the appellant's assertion in his affidavit submitted in support of his motion for new trial "that he would have insisted on having a jury decide his punishment, had his trial attorney

given him proper advice regarding how the jury was required to make the recommendation about community supervision." *Burch*, 2016 WL 4483087, at *5. Under *Riley*, the appellate court's reliance on this affidavit was error given the trial court's denial of the appellant's motion for new trial.

A. Riley v. State *mandates deference to the trial court's implicit factual findings.*

In *Riley*, this Court considered whether a trial court erred in denying a motion for new trial on grounds that Riley's trial counsel was constitutionally ineffective for incorrectly advising Riley that he would be eligible for probation from the jury upon his conviction for murder. *See Riley*, 378 S.W.3d at 455–56. Similar to this case, all parties agreed that Riley's trial counsel gave incorrect advice regarding Riley's eligibility for probation; and Riley submitted an affidavit in support of his motion for new trial asserting, "had his trial attorneys not given him erroneous advice concerning his eligibility for probation, he would have entered an open plea of *nolo contendere* to the trial court in hopes that the trial court would grant deferred-adjudication probation pursuant to Texas Code of Criminal Procedure art. 42.12, § 5." *Id.* The State did not contest the truth of Riley's affidavit, but the trial court still denied his motion for new trial. *Id.*

In reversing the trial court, the Sixth Court of Appeals relied on Riley's affidavit to find the evidence conclusively showed that Riley based his decision to use the jury for punishment on counsel's erroneous advice and that Riley's decision

would have been different if counsel had correctly informed him of the law regarding community supervision. *Riley v. State*, 345 S.W.3d 413, 418–19 (Tex. App.—Texarkana 2011), *rev'd*, 378 S.W.3d 453 (Tex. Crim. App. 2012). Accordingly, because Riley's defense counsel "foreclosed Riley's possibility of receiving deferred adjudication[,]" the Sixth Court of Appeals found that "there was a reasonable probability that the result of the proceeding would have been different absent the erroneous advice." *Id.* at 419–20.

In reversing the Sixth Court of Appeals, this Court set forth the appropriate standard of review when evaluating whether a trial court erred in denying a motion for new trial:

> An appellate court reviews a trial court's denial of a motion for new trial for an abuse of discretion, reversing only if the trial judge's opinion was clearly erroneous and arbitrary. A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling. This deferential review requires the appellate court to view the evidence in the light most favorable to the trial court's ruling. The appellate court must not substitute its own judgment for that of the trial court and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> This same deferential review must be given to a trial court's determination of historical facts when it is based solely on affidavits, regardless of whether the affidavits are controverted. The trial court is free to disbelieve an affidavit, especially one unsupported by live testimony.

Riley, 378 S.W.3d at 457–58 (internal quotations and citations omitted).

This Court further explained that the well-established *Strickland* standard for evaluating whether a defendant was denied his constitutional right to the effective assistance of counsel requires the defendant to show that his counsel was deficient and that such deficiency prejudiced the defendant. *Id.* at 458 (citing *Strickland*, 466 U.S. at 698). Both prongs of the inquiry are mixed questions of law and fact, "but the prejudice prong often contains 'subsidiary question of historical fact, some of which may turn upon the credibility and demeanor of witnesses.'" *Id.* (quoting *Kober v. State*, 988 S.W.2d 230, 233 (Tex. Crim. App. 1999)). "Appellate courts must show almost total deference to a trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor." *Id.*

This Court also laid out the test for evaluating ineffective assistance claims based upon counsel's apparent misunderstanding of the law regarding community supervision:

> [T]here must be evidence that: the defendant was initially eligible for community supervision; counsel's advice was not given as a part of a valid trial strategy; the defendant's election of the assessor of punishment was based upon his attorney's erroneous advice; and the results of the proceeding would have been different had his attorney correctly informed him of the law.

Id. (citing *State v. Recer*, 815 S.W.2d 730, 731–32 (Tex. Crim. App. 1991)).

In analyzing the decision of the Sixth Court of Appeals, this Court agreed with the lower court's assessment of the first two *Recer* factors but concluded that

the Sixth Court's finding that the record "conclusively showed" the results of the proceeding would have been different, given nothing more than the affidavits provided by Riley and his counsel, was an overstatement. *Id.* at 459. This Court reasoned that Riley had raised the prejudice issue before the trial judge in his motion for new trial, and because the trial judge denied the motion, the reviewing court must presume that the trial judge implicitly found the Riley's affidavit not to be credible. *Id.* Thus, "the trial court did not have to accept [Riley]'s claim that he would have changed his plea had he received correct advice . . . [,]" and therefore Riley failed to establish the latter two *Recer* factors. *See id.*

B. The Ninth Court of Appeals failed to defer to the trial court's implicit disbelief of the affidavits supporting the appellant's motion for new trial.

Respectfully, the court of appeals in this case mischaracterized the State's argument regarding the prejudice prong of *Strickland* by narrowing the State's position: "the State argues that [the appellant] should not be awarded a new punishment hearing because he has not shown that a jury would have given him a sentence different from the sentence he got from the judge." *Burch*, 2016 WL 4483087, at *5. While this is partially true, the court of appeals ignored the State's foremost argument that, under *Riley*, the trial court implicitly found the appellant's affidavit not to be credible when it denied his motion for new trial.

Like in *Riley*, the affidavits submitted in support of the appellant's motion for new trial provided the only evidence affirmatively establishing that the appellant would have made a different decision but for counsel's incorrect advice. Additionally, like in *Riley*, the appellant asserted his prejudice argument in a motion for new trial, which the trial court denied. If the trial court had believed the appellant's supporting affidavits, it would have had little choice but to grant his motion for new trial because all parties agreed that the appellant's trial counsel offered incorrect advice. By denying the motion for new trial, however, the trial court implicitly disbelieved the appellant's supporting affidavits.

Under the appropriate standard set forth in *Riley* and *Strickland*, the Ninth Court of Appeals was required to defer to the lower court's credibility determinations because whether there was a reasonable probability that the outcome of the proceedings would have been different but for counsel's error was a mixed question of law and fact that turned on the trial court's determinations of historical facts and credibility. The Ninth Court of Appeals erred by doing the opposite, and this Court should reverse that decision to correct the error.

II. The trial court erroneously burdened the State to disprove prejudice and speculated as to whether there was a reasonable probability that the outcome of the trial would have been different but for counsel's error.

Regardless of whether the trial court accepted the appellant's assertion that he would not have elected for the court to assess his punishment but for counsel's

incorrect advice, the issue remains whether correct advice would have changed the result of the proceeding. *See Riley*, 378 S.W.3d at 459.

A. The appellant bears the burden of establishing prejudice under Strickland.

To prove prejudice as a result of counsel's deficient performance, the burden rests on the claimant to establish a "reasonable probability" that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.* "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome . . . The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011).

The Ninth Court of Appeals phrased its holding conversely to the applicable standard of review, effectively placing the burden on the State to disprove prejudice: "We are also not confident that the result that [the appellant] achieved in his trial would not have been better than the seven-year sentence he received, given that the jury would have been required to consider the evidence and the arguments asserting that [the appellant] was entitled to be placed on community supervision." *Burch*, 2016 WL 4483087, at *6. Such a holding not only defies the *Strickland* standard, but also ignores the fact that the record reasonably supports the trial court's contrary conclusion.

B. A reasonable review of the record supports the trial court's conclusion that the appellant failed to establish prejudice.

The *Riley* case is again analogous here. After this Court concluded the Sixth Court of Appeals erroneously failed to defer to the trial court's implicit credibility findings, the Court continued, "even if the trial court accepted [the defendant's] assertion, the issue remains whether correct advice would have changed the result of the proceeding." *Riley*, 378 S.W.3d at 459. In analyzing this question, this Court referred to the proffered strategy of trial counsel: a theory of self-defense. *Id.* at 460. This Court reasoned that the theory of self-defense and the pursuit of a lesser-included offense would have been unavailable to the defendant had he chosen to plead guilty or nolo contendere, and therefore a different election was inconsistent with trial strategy. *See id.* This Court also addressed counsel's decision to seek probation via testimony of a probation officer, holding that the evidence could have been viewed simply as mitigation evidence. *See id.* As a result, this Court declined to infer, without a proper showing, a reasonable probability that the result of the proceeding would have been different but for counsel's deficiency. *See id.*

Likewise, in this case, a change in the appellant's decision to elect for the trial court to assess his punishment would have been inconsistent with the trial strategy expressed in the record. The appellant's trial counsel explained in his

affidavit why he advised the appellant to elect for the court to assess his punishment:

> My reasoning was based on my understanding of article 42.12 § 5 and 10 years' experience that juries tended to access [sic] greater time when sentencing on sexual assault cases than judges typically do, along with the fact that the jury would have also heard evidence of a prior arrest for a sexual assault of a minor that was later dismissed in the sentencing phase. Lastly, I had factored in that the judge would take into consideration that the District Attorney's office . . . had offered [the appellant] a deferred adjudication on a lesser charge of Unlawful Restraint.

(C.R. 183–84). It remains undisputed that the appellant's trial counsel misinterpreted article 42.12 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 42.12, §§ 3g–5 (West Supp. 2016) (providing that a defendant convicted of sexual assault is eligible for probation from the jury but not the court). Evidently, however, the appellant's trial counsel chose to advise the appellant to have the trial court assess punishment at least in part because counsel believed the judge to be more lenient than a jury. And, crucially, the record demonstrates that the trial judge in this case shared with counsel the same erroneous belief regarding the appellant's eligibility for probation from the court (7 R.R. 4). The trial judge openly weighed the option of giving the appellant probation but instead chose to assess a sentence of imprisonment for seven years in light of the severity of the crime (7 R.R. 19–20). Simply put, the appellant received exactly what he intended: a more-lenient factfinder considering the option

of recommending a sentence of community supervision. Yet, the appellant still did not receive the sentence he desired.

Given counsel's experience regarding the comparative leniency between judges and juries in Montgomery County, a logical deduction from the evidence establishes that a jury likewise would not have recommended that the appellant's sentence be suspended in favor of community supervision. At the very least, the appellant has failed to satisfy his burden to show a substantial likelihood of the contrary. And although the appellant's trial counsel argued in favor of probation and elicited testimony regarding the appellant's potential success in completing the conditions of community supervision, like in *Riley*, the trial court could have reasonably viewed such efforts merely as mitigation evidence. Thus, the trial court's ruling that the appellant failed to establish a reasonable probability that the outcome of the proceeding would have been different had he received correct advice was not arbitrary, clearly erroneous, or unsupported by a reasonable view of the record.

By holding otherwise, the Ninth Court of Appeals improperly speculated as to whether the weight of the evidence would have changed the outcome of the punishment hearing. *See Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002) (denouncing speculative assessment of ineffective-assistance claims). Indeed, the court of appeals conceded at the start of its analysis, "[W]e cannot

determine what a jury might have ultimately recommended as to [the appellant]'s punishment . . . ." *Burch*, 2016 WL 4483087, at *6. When comparing the evidence in favor of the appellant (he was gainfully employed and supported a child from a previous marriage) with the evidence supporting the imposition of a rigid punishment (he exhibited a pattern of sexual abuse; he molested an unconscious teenage girl several years his junior, whom he barely knew, after providing her with copious amounts of alcohol; and he fled the area in an apparent attempt to elude law enforcement authorities), the trial court's conclusion that a jury likely would not have recommended community supervision was entirely reasonable.

As such, the Ninth Court of Appeals erred by disturbing the trial court's conclusion that the appellant failed to establish prejudice. *See Miller v. State*, No. 05-14-01065-CR, 2015 WL 3456783, at *4–5 (Tex. App.—Dallas June 1, 2015, pet. granted) (mem. op., not designated for publication) (deferring to trial court's implicit determination that there was no reasonable probability that the result of the proceeding would have been different after Miller relied on erroneous advice of counsel regarding eligibility for probation in waiving right to jury trial); *Harris v. State*, No. 06-12-00101-CR, 2013 WL 462954, at *4 (Tex. App.—Texarkana July 30, 2013, pet. ref'd) (mem. op., not designated for publication) (viewing denial of motion for new trial, which raised ineffective assistance of counsel claim, as implicit finding that even if Harris received correct advice, the result of the

proceeding would not have changed). This Court should sustain the State's grounds for relief and reverse the lower court's decision to grant the appellant a new punishment hearing.

CONCLUSION AND PRAYER

It is respectfully submitted that this Court should reverse the lower court's decision to grant the appellant a new punishment hearing and remand the case for consideration of the appellant's remaining issues.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Tex. R. App. P. 9.4(i)(2)(B) because there are 4,608 words in this document, excluding the portions of the document excepted from the word count under Rule 9(i)(1), as calculated by the Microsoft Word computer program used to prepare it.

/s/ Brent Chapell
BRENT CHAPELL
Assistant District Attorney
Montgomery County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served electronically on counsel for the appellant-respondent on the date of the submission of the original to the Clerk of this Court.

/s/ Brent Chapell
BRENT CHAPELL
Assistant District Attorney
Montgomery County, Texas